DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 96-0522
Sales and Use Tax
For The Period: 1993-1995

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ISSUES

I. Sales/Use Tax: Public Transportation Exemption

Authority: IC 6-2.5-5-27; 45 IAC 2.2-5-61; National Serv-All, Inc. v. Indiana Dept. of State Revenue, 644 N.E.2d 954 (Ind.Tax 1994); Indiana Waste Systems v. Indiana Dept. of State Revenue, 644 N.E.2d 960 (Ind.Tax 1994); Panhandle Eastern Pipeline Co., v. Indiana Dept. of State Revenue, 2001 WL 8920 (Ind.Tax 2001).

The taxpayer protests the assessment of sales/use tax on consumable supplies.

STATEMENT OF FACTS

The taxpayer operates a dairy, two cafeterias, a delivery fleet, and a public transportation company. The taxpayer uses seventy-one (71) pieces of transportation equipment (trucks and trailer units) in its operations. Eight units out of the 71 are used solely for providing public transportation for hire. The taxpayer specifically designates the 8 trucks and trailer units as hauling for hire. They were not used for any other function during the period at issue.

I. Sales/Use Tax: Public Transportation Exemption

DISCUSSION

The auditor assessed use tax on fuel and repair parts relating to trucks that were used to transport bagged ice for another corporation. The auditor concluded that the transportation service taxpayer provided to the other corporation was not the predominant use of the taxpayer's truck fleet. Thus, the taxpayer did not come within the ambit of IC 6-2.5-5-27 and 45 IAC 2.2-5-61, and the auditor deemed the fuel and

repair parts consumed by the eight trucks and trailers (hereinafter referred to as "truck units") as taxable. The auditor takes the position that the transportation services provided by the taxpayer must be the predominant use or purpose of the taxpayer's truck fleet.

The taxpayer argues that it is not the overall fleet that is to be analyzed, but the predominant use of the individual vehicles (i.e., the 8 truck units) that should be looked at. The differences in the auditor and the taxpayer can be set out thusly:

> Auditor: Predominant use or purpose of the taxpayer's fleet. Since only 8 of the 71 truck units are used for public transportation, the taxpayer fails to be predominantly engaged in public transportation.
>
> Taxpayer: The individual vehicle must be used predominantly in public transportation. Since 8 truck units meet this test (the 8 truck units are used exclusively for public transportation) they meet the predominant use test (in fact they are entirely, not just predominantly used, for public transport).

Some background on the history of the "predominant" test(s) sheds light on the situation.

The Tax Court has addressed the issue of public transportation in several cases. The first two cases involved contract hauling of garbage. In National Serv-All, Inc. v. Indiana Department of State Revenue, 644 N.E.2d 954 (Ind. Tax 1994), the Tax Court stated that although National Serv-All "engaged in 'public transportation' when it hauled Contract garbage," nonetheless National Serv-All did not prove "that its hauling of Contract garbage was the *predominant share* of its use of the items at issue." Id. at 959 (Emphasis in the original). The court concluded: "Although National engaged in the public transportation of property within the meaning of I.C. 6-2.5-5-27 when it hauled Contract garbage, it did not prove it predominantly engaged in public transportation." Id. at 960.

The Tax Court also faced a similar issue (public transportation and Contract garbage hauling) in Indiana Waste Systems of Indiana, Inc. v. Indiana Department of State Revenue, 644 N.E.2d 960 (Ind. Tax 1994). In that case the Court held that:

> Waste Management's maximum annual revenue from public transportation was 17.7 percent of its total revenue, and therefore, the remaining 80 plus percent of its revenue came from non-public transportation. The predominant use of Waste Management's trucks and other items, therefore, is not exempt . . . .

Id. at 962.
The third case dealing with this issue for the Tax Court is Panhandle Eastern Pipeline Co. v. Indiana Department of State Revenue, 2001 WL 8920 (Ind. Tax 2001). Although this case is dissimilar insofar as it dealt with gas pipeline system and not trucks, the

public transportation exemption was the issue litigated. The Tax Court, after noting the relevance of its two previous cases on public transportation, stated the following:

> If a taxpayer acquires tangible personal property for predominate use in providing public transportation for third parties, then it is entitled to the exemption. If a taxpayer is not predominately engaged in transporting the property of another, it is not entitled to the exemption.

The Tax Court has set out a two-pronged test:

(1) The taxpayer must be *predominately engaged* in public transportation of the property of another; and
(2) The taxpayer's property must be *predominately used* for providing pubic transportation.

Prong (1) looks at the taxpayer itself—namely, is the taxpayer predominately engaged in public transport (this comports with the holding cited above in Indiana Waste Systems). Prong (2) looks at the individual units to see how they are used. Both prongs must be satisfied.

Under this analysis, the taxpayer is not predominately engaged in public transportation, since only 8 of the 71 truck units are involved with public transportation. Therefore, having failed prong (1), we need not turn to prong (2).

FINDING

The taxpayer's protest is denied.

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